Filed 12/9/08 Arroyo v. City of San Diego CA4/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| FELIPE ARROYO,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CITY OF SAN DIEGO,<br><br>Defendant and Respondent. | D052158<br><br><br><br>(Super. Ct. No. GIC803561) |

APPEAL from a judgment of the Superior Court of San Diego County, Luis R. Vargas, Judge. Affirmed.

Felipe Arroyo, a City of San Diego (City) police officer, brought an action against the City claiming the City discriminated against him based on his Hispanic background and unlawfully retaliated against him when he complained about the discrimination. In a prior trial, the jury found in Arroyo's favor on both of these claims and awarded him $1,325,000. The City appealed, challenging the legal and factual basis for the jury's findings. In a cross-appeal, Arroyo contended the court erred in granting the City's

motion for directed verdict on his discrimination claim for failure to promote him to a sergeant position in 1998.

In our prior appellate decision, we concluded insufficient evidence supported the jury's findings on Arroyo's intentional discrimination claim, but held the court erred in granting a directed verdict on Arroyo's discrimination claim based on the City's failure to promote him. (*Arroyo v. City of San Diego* (Mar. 27, 2006, D044938) [nonpub. opn.] (*Arroyo I*).) Accordingly, on Arroyo's intentional discrimination claim, we reversed the judgment, but remanded for a limited retrial solely on Arroyo's claim that the City's refusal to promote him in 1998 constituted unlawful discrimination based on his national origin. On Arroyo's retaliation claim, we affirmed the judgment and the $750,000 noneconomic damage award, but struck the economic damages portion of the award because of a lack of supporting evidence.

On remand, the City successfully moved for summary judgment on Arroyo's failure to promote claim. Arroyo now appeals from that judgment. We affirm.

## FACTUAL AND PROCEDURAL SUMMARY

### A. *Background*

To properly resolve the issues raised on this appeal, it is helpful to first summarize the background of this litigation, including our prior appellate rulings.

Arroyo was born in Mexico and spoke Spanish as his first language. In 1978, Arroyo began working for the City's police department (Department). In 1989, he transferred into the narcotics section and was promoted to detective. Six years later, Arroyo transferred into the Narcotics Task Force, a law enforcement unit led by the

federal Drug Enforcement Agency (DEA). After several years of performing outstanding work, Arroyo attempted to transfer to other units, but the Department did not approve the transfers. Arroyo also applied for promotion to the sergeant level, but he was unsuccessful.

In January 2003, Arroyo sued the City alleging it violated the Fair Employment and Housing Act (FEHA) by discriminating against him on the basis of his national origin (Hispanic), and unlawfully retaliating against him for complaining about the discrimination.[1] (Gov. Code, § 12940, subds. (a), (h).)

At trial, Arroyo based his discrimination claim on his argument that because he is Hispanic and speaks Spanish fluently, he was: (1) given more work and more dangerous work than non-Hispanic/non-Spanish-speaking officers; and (2) unfairly rejected for promotion in March 1998. With respect to his retaliation claim, Arroyo presented evidence that he suffered an adverse employment action shortly after informing the Department that he had filed a discrimination claim with a federal agency.

At the end of the evidentiary portion of the trial, the City moved for a directed verdict. The court granted the motion on: (1) Arroyo's cause of action for discrimination based on a disparate impact theory; and (2) Arroyo's cause of action for discrimination with respect to the City's failure to promote him in March 1998. Thus, the jury was instructed that Arroyo's discrimination cause of action was based solely on Arroyo's

---

[1] Because both parties refer to Arroyo's national origin as "Hispanic" (rather than Mexican), we shall do the same in this opinion.

claims that the City assigned him "an excessive amount" of work and "dangerous" work based on his national origin. The jury returned a special verdict in Arroyo's favor on his discrimination and retaliation claims. On the discrimination claim, the jury awarded Arroyo $425,000 in damages. On Arroyo's retaliation claim, the jury awarded Arroyo $150,000 in economic loss and $750,000 in noneconomic loss. The court thus entered judgment in Arroyo's favor for $1,325,000.

Both parties appealed.

On the City's appeal, we held the jury's findings that Arroyo was assigned an "excessive" amount of work and "dangerous" work because of his national origin were factually and legally insufficient to establish an FEHA violation. (*Arroyo I, supra.*) We reasoned that to prove his disparate treatment claim, Arroyo was required to present "'evidence supporting a rational inference that intentional discrimination, on grounds prohibited by the statute, was the true cause of the employer's action.'" (*Ibid.*) However, there was no evidence the Department intentionally sought to treat Arroyo less favorably than other employees in his work assignments. Additionally, the jury did not find, and was not asked to find, that Arroyo was assigned more work *than other employees* and/or was required to perform more dangerous work *than other employees* because of his national origin. We stated that, at most, Arroyo's challenge to the City's hiring practices amounted to a disparate impact claim, which challenges a facially neutral employer practice that has a disproportionate adverse effect on members of a protected class. (*Ibid.*) But the trial court had granted a directed verdict on this theory, and Arroyo did not challenge this ruling on appeal. (*Ibid.*)

We cautioned, however, that our conclusion should not be interpreted to mean that an unfavorable work assignment based on a protected category cannot form the basis of a discrimination claim as a matter of law. (*Arroyo I, supra.*) In a footnote, we said that "on retrial Arroyo will have the opportunity to raise the argument that his assignments were discriminatory because they eliminated or limited promotion opportunities." (*Ibid.*)

On Arroyo's cross-appeal, we held the trial court erred in granting a directed verdict on Arroyo's discrimination claim based on the Department's failure to promote him. (*Arroyo I, supra.*) We explained the City had conceded Arroyo met his prima facie burden to show discrimination on the failure to promote claim, and under the *McDonnell Douglas*[2] burden-shifting test, the City then had the burden to "articulate a legitimate, nondiscriminatory reason for the adverse employment action." (*Ibid.*) The City, however, "did not proffer any evidence pertaining to the reason that it did not select Arroyo for a promotion." (*Ibid.*) The trial court nonetheless granted a directed verdict on the claim, stating Arroyo had the burden to call the police chief as a witness at trial to explain his decision not to promote Arroyo and Arroyo had the burden to produce evidence pertaining to the qualifications of the police officers who were promoted. (*Ibid.*)

We held this was an incorrect application of the *McDonnell Douglas* test in the context of ruling on a directed verdict motion. Because the City failed to offer a legitimate nondiscriminatory reason for denying Arroyo the sergeant position, the

---

2 *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*).

ultimate burden never shifted to Arroyo to produce additional evidence of a discriminatory motive. (*Arroyo I, supra.*) On the retaliation claim, we upheld the judgment in Arroyo's favor, including the $750,000 noneconomic damage award, except that we struck the economic damage award of $150,000, determining insufficient evidence supported a finding that Arroyo suffered economic damages resulting from the retaliation.

Thus, our Disposition read: "The judgment on Arroyo's intentional discrimination cause of action is reversed. We remand for a trial on Arroyo's claim that the City's refusal to promote Arroyo in 1998 constituted unlawful discrimination based on his national origin. The judgment on Arroyo's retaliation cause of action is affirmed to the extent it holds the City liable for unlawful retaliation and awards him $750,000 in noneconomic damages. We strike the award of economic damages on the retaliation claim." (*Arroyo I, supra.*)

B. *Summary Judgment Proceedings*

On remand, the City moved for summary judgment on Arroyo's failure to promote claim. In the City's memorandum of points and authorities, the City stated the parties had *agreed* to this procedure. Arroyo never challenged or disputed this statement.

In support of its summary judgment motion, the City presented evidence that Departmental promotions are based on an eligibility list that is maintained for a two-year period. The promotional process involves candidates taking a written test, obtaining a score, participating in an interview and obtaining a ranking, and then if ranked high enough, being placed on an eligibility list for two years, after which the list expires.

The City produced a copy of the 1996-1998 list of police officers eligible for promotion to the sergeant position (Eligibility List). The list was divided into three categories: Highly Qualified Plus, Highly Qualified, and Highly Qualified Minus. There were 27 people in the Highly Qualified Plus category, 38 people in the Highly Qualified category, and 15 people in the Highly Qualified Minus category. Arroyo's name was the first name on the Highly Qualified Minus list.

In March 1998, the City promoted six police officers from the Eligibility List. Four of the police officers selected for promotion were in the Highly Qualified Plus category (Dan Cerar, Dan Douglas, Ronald Larmour, Peter Morales). Two of the police officers selected for promotion were in the Highly Qualified category (Michael Parga and John Smith). None of the individuals selected were from the Highly Qualified Minus category. Two of the individuals selected (Parga and Morales) are Hispanic.

The City also submitted portions of the deposition of Mayor Jerry Sanders, the former Chief of Police, who made the final sergeant promotion decision in March 1998. Mayor Sanders testified that he did not remember the specific basis for this decision, but explained his selection procedures. He stated: "In general, I would look at the recommendations of the people who interviewed. I would look at the recommendations of the commanding officers. I also took feedback from anybody who wanted to provide me with feedback, and a variety of people would provide that, whether they were sergeants or officers or lieutenants or anybody could send in feedback or give me a call. [¶] I also generally throughout all the lists that we had, whether it was hiring, promotion or anything else, tried to adhere to a standard of promoting 50 percent people of color and

women. So that always went into the consideration." Mayor Sanders also said he "would frequently ask . . . the people on the [interview] panel [for their opinions], and then compare those with what I had seen in this [list] and the commanding officer's recommendations and the other recommendations I got." He emphasized that he was required to select from numerous highly qualified officers.

The City additionally presented the declaration of assistant chief David Ramirez, who served on the interview panel for the sergeant promotional examination during 1996 through 1998. During Arroyo's April 1996 interview, Ramirez (who was a lieutenant at the time) wrote in his notes that Arroyo lacked some "detail" in responding to certain questions. After this interview, the panel rated Arroyo "qualified plus." After a second (December 1997) interview, the panel raised Arroyo's overall rating to "*highly* qualified minus." (Italics added.) Ramirez testified that the rating was based on numerous factors including the interview responses, supervisor recommendations, and performance evaluations.

Based on this evidence, the City argued it met its burden to show legitimate, nondiscriminatory reasons for the decision not to promote Arroyo, and to promote the six individuals who were selected. The City asserted that "[Mayor] Sanders considered factors that any unbiased person would expect him to consider—the interview panelists' recommendations, supervisor's recommendations, and performance evaluations . . . ," and he made specific efforts to promote "women and people of color."

In opposition to the motion, Arroyo produced a portion of Mayor Sanders's deposition, wherein he stated that he did not specifically recall Arroyo's situation or the

factors he considered in denying him a promotion, and he did not specifically recognize the Eligibility List as the list he reviewed in making his 1998 promotion decision. Based on this evidence, Arroyo objected to the court considering the Eligibility List, arguing the document had not been authenticated, lacked foundation, and was hearsay.

Arroyo additionally relied on his own deposition testimony in which he stated that his supervisor (Sergeant Foreman) initially wrote on Arroyo's promotion recommendation form that Arroyo had an "unprofessional Mexican accent," but Sergeant Foreman deleted that comment after Arroyo complained about it. Arroyo testified at his deposition that in his opinion the Department's decision to keep him in the narcotics division for most of his career "counted" against him and that he believed the interview panel notes reflected "something along [the] lines" of "'this guy is a victim of over specialization . . . .'"

Arroyo also presented additional deposition testimony of assistant chief Ramirez who acknowledged that diverse experience was an important consideration in the promotion decision. At this deposition, Ramirez initially denied he had ever characterized Arroyo as being "one dimensional." However, after he was shown an interview feedback form prepared by him with the words "one dimensional" written on the form, Ramirez acknowledged he wrote this phrase in his notes pertaining to the interview panel's discussion of Arroyo.

Arroyo also produced one page from the deposition transcript of one of the successful candidates (Daniel Cerar), in which Cerar stated he always received "above standard" performance evaluations and has "15 commanding officer citations," but that he

had never received an "outstanding" evaluation. In an attempt to show he was a better candidate than Cerar, Arroyo proffered a copy of his performance review report for July 1997 through July 1998, which rated his overall job performance in the outstanding category.

Arroyo also submitted a copy of the prior judgment and our appellate opinion in *Arroyo I*. Arroyo relied on these judicial documents in an attempt to establish that he had been discriminated against in his work assignments because he is Hispanic, and this discrimination precluded him from obtaining a promotion.

In its reply papers, the City produced a declaration of Margaret Mendez, a supervising personnel officer, who stated that "'Exhibit D' [the Eligibility List] . . . is a list of names of candidates who received a ranking of highly qualified plus, highly qualified, and highly qualified minus during the 1996-1998 promotion eligibility period."

After considering the parties' papers and conducting a hearing, the court overruled Arroyo's evidentiary objections and granted the City's summary judgment motion. The court found the "City provided evidence of a legitimate, non-discriminatory reason for not promoting [Arroyo]," and Arroyo failed to meet his burden to show this reason was pretextual.

## DISCUSSION

### I. *General Legal Principles*

We review the trial court's summary judgment de novo and decide independently whether the parties have met their respective burdens and whether the undisputed facts warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003)

30 Cal.4th 1342, 1348; Code Civ. Proc., § 437c, subd. (c).) Evidentiary rulings made by the trial court in summary judgment proceedings are reviewed for abuse of discretion. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.)

In analyzing employment discrimination claims, California courts apply the three-stage burden-shifting test set forth in *McDonnell Douglas, supra*, 411 U.S. 792. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354 (*Guz*); *Reeves v. Safeway Stores, Inc*. (2004) 121 Cal.App.4th 95, 111.) Under this test, (1) the plaintiff/employee must set forth sufficient evidence to establish a prima facie case of discrimination; (2) the defendant/employer must then articulate a legitimate, nondiscriminatory reason for the adverse employment action; and (3) the burden then shifts back to the employee to show the challenged action in fact resulted from discriminatory animus. (*Guz, supra*, at pp. 354-356.)

When the employer moves for summary judgment, the employer "'must bear the initial burden of showing the action has no merit.'" (*Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156.) "If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing." (*Caldwell v. Paramount Unified School Dist*. (1995) 41 Cal.App.4th 189, 203.) Once the burden shifts, the employee must present "substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the

employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 (*Hersant*).)

## II. *Arroyo's FEHA Failure to Promote Claim*

### A. *The City Met Its Summary Judgment Burden*

In moving for summary judgment, the City did not dispute that Arroyo can meet his initial burden to show a prima facie case of discrimination—he is Hispanic, was qualified for the promotion, and did not receive the promotion. The City instead sought to prevail on its summary judgment motion based on its argument that the Department's failure to promote Arroyo was based on legitimate, nondiscriminatory factors.

To support this position, the City produced evidence that the decision maker (Mayor Sanders) reviewed the list of 80 highly qualified candidates, discussed the candidates with various individuals, and made a decision based on numerous factors, none of which pertained to Arroyo's national origin. The evidence showed that Arroyo's eligibility ranking was lower than 65 other qualified candidates. The City also produced the testimony of assistant police chief Ramirez, a member of Arroyo's interview panel, who stated that the interview panel gave Arroyo a "highly qualified minus" rating based on Arroyo's interview responses and on the recommendations of his supervising officers.

This evidence satisfied the City's summary judgment burden. The City presented legitimate nondiscriminatory reasons for its actions—that it promoted the six candidates it considered to be the most qualified for the open sergeant positions. The evidence also

showed Mayor Sanders affirmatively sought to select members of underrepresented groups, including Hispanic and women police officers.

Arroyo contends this evidence was insufficient because Mayor Sanders did not specifically recall the reason for the March 1998 promotion decision. This argument is unavailing because it goes to the weight of the evidence. Mayor Sanders's testimony supports that although he did not remember the grounds for this specific promotion decision, he would have adhered to his general procedures for deciding who to promote, and those procedures were based on nondiscriminatory factors. The issue of the credibility and validity of the employer's articulated reason for the termination arises in the third step, not the second step of the analysis. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 257-258; see *Hersant, supra*, 57 Cal.App.4th at p. 1003; see also *Raad v. Fairbanks North Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1196.) To satisfy its burden, an employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." (*Burdine*, *supra*, 450 U.S. at p. 257.) Although Mayor Sanders did not remember the precise reasons why he did not select Arroyo, his testimony about his general policies and selection criteria supported that his decision was made based on nondiscriminatory factors.[3]

---

3 Mayor Sanders's inability to recall the details of the promotion decision is not surprising given that it occurred nine years before his deposition.

Arroyo also argues the City did not meet its burden to show a legitimate reason for the employment decision because Exhibit D, the Eligibility List for the March 1998 sergeant position, was inadmissible. The trial court overruled Arroyo's evidentiary objections to the document. This ruling was not an abuse of discretion.

Arroyo argues Exhibit D was not properly authenticated and was without foundation because Mayor Sanders was unable to say whether it was the eligibility list he considered in making his 1998 promotion decision. However, the City produced a supplemental declaration from a supervising personnel officer (Mendez) who identified the document as the "list of names of candidates who received a ranking of highly qualified plus, highly qualified, and highly qualified minus during the 1996-1998 promotion eligibility period." This testimony provided sufficient authentication for the document.

Arroyo also argued in the proceedings below that Exhibit D was hearsay. On appeal, Arroyo mentions the hearsay objection, but does not identify any legal or factual basis establishing the court erred in overruling this objection. He has thus waived the argument on appeal. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"].)

B. *Arroyo Did Not Meet His Burden to Establish Intentional Discrimination*

Because the City identified a specific and facially valid nondiscriminatory basis for the termination, the presumption of discrimination was eliminated and the burden

shifted to Arroyo to produce sufficient facts to create a triable issue of fact showing he was not promoted because he was Hispanic.

In his appellate briefs, Arroyo directs us to numerous facts in an attempt to show the City's discriminatory intent. As explained below, we conclude these facts, when considered singly or collectively, did not satisfy Arroyo's burden to support his claim that the City failed to promote him because of his national origin.

First, Arroyo relies on Mayor Sanders's testimony that in making promotion decisions he generally "tried to adhere to a standard of promoting 50 percent people of color and women." Arroyo argues that by giving preferential treatment to Hispanics and first selecting two other Hispanic police officers, Mayor Sanders refused to select him because he is Hispanic. The argument is unpersuasive. Mayor Sanders's testimony does not support a reasonable inference that he selected the other two Hispanic officers first or that he adhered to a rigid "quota" in the promotion decisions such that he would *deny* a promotion to a Hispanic police officer merely because he chose two other Hispanic officers. The fact that Mayor Sanders gave some preference to minority police officers does not logically show he intentionally discriminated against Arroyo. Instead, it leads to the opposite conclusion: that Arroyo had an enhanced chance to obtain a promotion based on his national origin.[4]

---

[4] Arroyo also relies on Mayor Sanders's testimony about the minority preferences to argue the City violated a different law, embodied in the constitutional provision enacted by Proposition 209. We address this argument in Section III below.

Arroyo also argues he met his burden to show intentional discrimination because (1) the Department repeatedly refused to permit him to transfer from the narcotics division into other units based on his Hispanic national origin; and (2) his lack of diverse experience was a substantial factor in the denial of a promotion.

The fundamental flaw in this argument is that Arroyo did not present *evidence* to support these assertions. Instead, Arroyo relied primarily on the prior jury verdict and on statements made in the *Arroyo I* decision. He argues that these findings and statements were binding on the City in the summary judgment proceeding because they serve as "law of the case."

The argument is without merit. The statements relied upon by Arroyo concern factual issues, which are not governed by the law of the case doctrine. (See *People v. Shuey* (1975) 13 Cal.3d 835, 842 ["The doctrine, as the name implies, is exclusively concerned with issues of law and not fact"]; *Erlin v. National Union Fire Ins. Co.* (1936) 7 Cal.2d 547, 549.) The extent to which a jury's factual findings are binding in a later trial between the same parties depends instead on the applicability of the collateral estoppel doctrine. (See *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1569.) Arroyo has not attempted to rely on this doctrine, nor could he properly do so. Collateral estoppel applies to preclude relitigation of an issue only if the decision in the former proceeding was final and on the merits. (See *Abelson v. National Union Fire Ins.* (1994) 28 Cal.App.4th 776, 787.) Because we reversed the discrimination portion of the judgment, the jury's findings are no longer binding in later proceedings.

Likewise, statements made in our prior opinion about evidence presented at the earlier trial cannot be used to substitute for Arroyo's summary judgment burden to produce specific facts showing a material factual issue. The purpose of the summary judgment procedure is to determine whether there are disputed factual issues requiring the process of a trial. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) If a party fails to come forward with *evidence* of those specific facts, the trial court must necessarily assume that such evidence would not be available at trial. In our prior appellate decision we stated we were remanding the case for a trial on the limited issue of Arroyo's claim that the City's failure to promote him in 1998 was based on his national origin. There is nothing in our decision suggesting that the parties could rely on evidence in the prior trial to establish their respective factual positions at the retrial.

In any event, the statements in our prior opinion do not support Arroyo's broad assertions that he has already proved intentional discrimination. For example, Arroyo cites to footnote 4 in our opinion in which we stated that Arroyo would have "the *opportunity*" on retrial to raise the argument that his work assignments were discriminatory because they precluded him from obtaining a promotion. (*Arroyo I, supra,* italics added.) This observation cannot be reasonably interpreted as reflecting a holding that such evidence of discrimination *existed*. Arroyo also takes out of context our statement that "Arroyo presented evidence from which the jury could reasonably conclude that his Hispanic national origin and appearance were significant factors, in addition to his language skills, in his work assignments." (*Ibid.*) We made that statement in rejecting the City's argument that its actions were based solely on Arroyo's language

abilities. The statement was not intended as a binding factual or legal conclusion that Arroyo was discriminated against in his work assignments or that such supporting facts exist. Arroyo also cites to a sentence in our discussion of the fact that Arroyo satisfied his burden to show a prima facie case of discrimination. A plaintiff's burden to show a prima facie case is very different from a plaintiff's burden on the third step of the *McDonnell Douglas* analysis.

Based on our conclusion that Arroyo did not submit *evidence* in opposition to the City's summary judgment motion showing he was assigned to, or refused transfers from, the narcotics division based on his Hispanic origin, his proffered evidence regarding the importance of diversity of experience in obtaining a promotion was insufficient to establish an FEHA violation. Absent evidence that the City acted intentionally to treat Arroyo differently in the promotion process because he is Hispanic, an FEHA claim based on disparate treatment cannot be stated.[5]

We find Arroyo's additional contentions to be without merit. Relying on Ramirez's initial denial that he had previously stated Arroyo was "one-dimensional" and then his later admission that he did make this statement, Arroyo argues that this impeachment is circumstantial evidence of intentional discrimination. Although in certain circumstances an employer's lack of credibility can support an inference that the

---

[5] Because the court granted a directed verdict on the disparate impact claim and Arroyo did not appeal from that claim, that claim was no longer before the trial court in the proceedings on remand.

asserted reason for the employment action was pretextual, this single inconsistency in Ramirez's testimony does not rise to this level.

Arroyo also relies on a note in his performance review stating that a federal drug enforcement officer who led Arroyo's narcotics task force was initially hesitant to appoint Arroyo as acting group supervisor because Arroyo was the only Spanish-speaking officer on the team and thus was needed for undercover work. This reliance is misplaced. The conduct or statements of a federal officer cannot be attributed to the Department's actions in its promotion decision.

We also reject Arroyo's reliance on his supervisor's statement in a performance evaluation referring to Arroyo's "unprofessional Mexican accent." Arroyo admitted his supervisor deleted this remark from the evaluation before it was provided to the Department, and there was no showing the decision makers for the 1998 promotion decision were aware of the remark or held similar opinions.

Finally, Arroyo attempts to show he was more qualified than one of the other officers who was promoted (Cerar) because Cerar had never received an "outstanding" performance evaluation, and Arroyo had received several outstanding ratings. However, the undisputed evidence showed that the performance evaluation rating was only one of many factors relevant to the promotion decisions. This single comparison between performance evaluation ratings was insufficient to raise a triable issue of fact regarding discriminatory intent.

Viewing all of the evidence presented by Arroyo in opposition to the summary judgment, we conclude Arroyo did not present sufficient facts to create a triable issue of

fact showing that the Department failed to promote him in March 1998 based on his Hispanic national origin.

III. *Arroyo's Proposition 209 Claim*

Arroyo alternatively argues the court erred in granting summary judgment because the facts support that the City violated Article 1, section 31 of the California Constitution, enacted by California voters in 1996 (Proposition 209), which prohibits public entities (including cities) from considering an individual's gender or race in employment decisions. Arroyo argues that Mayor Sanders's statement that he tried to adhere to a standard of promoting candidates "so that 50% were people of color and women" shows the City violated this constitutional provision.

The argument is unavailing. Arroyo never alleged a violation of Proposition 209 in his pleadings. Our review of a summary judgment is limited to the issues framed by the pleadings because the allegations in the pleadings are the ones to which a summary judgment motion must respond. (*Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1252; *Hernandez v. Modesto Portuguese Pentecost Assn*. (1995) 40 Cal.App.4th 1274, 1279.) "'The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues'" (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381), and the supporting declarations serve "'to disclose whether there is any triable issue of fact within the issues delimited by the pleadings.' [Citations.]" (*Ibid*.)

Additionally, Arroyo waived the argument because he never raised it in the summary judgment proceedings, nor at the first trial. We do not consider arguments on appeal unless they were raised below. (*North Coast Business Park v. Nielsen*

*Construction Co*. (1993) 17 Cal.App.4th 22, 28-29 [alternate basis of liability not raised by appellant in opposing summary judgment motion below will not be considered on appeal]; accord *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412 [failure to raise issue or argument in the trial court results in forfeiture on appeal]; see also *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 988-989 [party may not change theory of a cause of action on appeal and raise issue not presented in opposition to summary judgment].)

Arroyo urges us to apply an exception to this rule because his argument raises solely an issue of law. We decline to do so. First, the matter was before the trial court after a limited remand by this court. We stated in our prior appellate decision that we were reversing *only* the court's directed verdict on Arroyo's claim that the City violated the FEHA by failing to promote him in 1998 because of his national origin. (*Arroyo I, supra.*) This reversal did not allow for Arroyo to raise new legal claims in the trial court or in a second appeal. "'When there has been a decision upon appeal, the trial court is reinvested with jurisdiction . . . *to act only in accordance with the direction of the reviewing court; action which does not confirm to those directions is void*.'" (*Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530.)

Moreover, it is not clear the Proposition 209 issue is solely one of law. If Arroyo had asserted the claim below, the City would have had the opportunity to present additional evidence that could have clarified Mayor Sanders's testimony as to the precise dates of his consideration of gender or minority status in making employment decisions. Additionally, even if Mayor Sanders had applied a gender/racial preference in favor of

women or minorities in the 1998 decision, it is not clear on the record that Arroyo would have standing to raise the issue since it does not appear he was adversely affected by this preference.

## IV. *Summary Judgment Proceedings Were Proper*

We also reject Arroyo's argument that the summary judgment proceedings were beyond the scope of our order remanding the case "*for a trial*." (Italics added.) The record shows Arroyo expressly agreed to the summary judgment procedure. Thus, any error was invited. In its summary judgment motion, the City stated: "The parties agreed that the matter could likely be decided short of trial through motions for summary judgment, and the court set dates for the parties to file their respective motions." In his opposition papers, Arroyo did not dispute this statement, and never objected to the summary judgment procedure until he filed his appellate brief.

Arroyo's argument also fails on its merits. The City's summary judgment motion fell within the proper scope of our remand. "'In its broad meaning, the term "trial" includes a trial on the law alone.'" (*Misic v. Segars* (1995) 37 Cal.App.4th 1149, 1153.) A summary judgment procedure can constitute a "trial." (*Ibid.*; see *Kindt v. Kauffman* (1976) 57 Cal.App.3d 845, 862; *City of Pasadena v. Superior Court* (1931) 212 Cal. 309, 313.)

## DISPOSITION

Judgment affirmed. Arroyo to bear the City's costs on appeal.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.